IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-973

Supreme Court, U. S.
FILED
JAN 9 1973
MICHAEL RODAK, JR., CLERK

Norman G. Hicks,
Petitioner

v.

State of North Carolina

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

James Nathaniel Hamrick, Esq.
Main Street
Rutherfordton, N.C.

William H. Miller, Esq.
P.O. Box 1472
Tryon, N.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

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Petitioner, Norman G. Hicks, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this proceeding on October 11, 1972, finding no error and upholding Petitioner's conviction for burglary.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported in State v. Hicks, 282 N.C. 103, 191 S.E.2d 593, and appears in the appendix hereto. No opinion was rendered by the Superior Court, Polk County North Carolina.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on October 11, 1972. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), Petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution of the United States.

QUESTIONS PRESENTED:

1. Whether the identification procedure was so suggestive and conclusive to misidentification as to deny Petitioner due process of law?

2. Whether Petitioner's right under the Speedy Trial Clause of the Sixth Amendment to the United States Constitution were violated by the unreasonable delay of over four days between his arrest and the service of a warrant charging him with burglary.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled to any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On or about October 4, 1970, a burglary was committed at the home of one Landon Clark at Hickory Grove, Polk County, North Carolina. Mr. Clark was at home at the time of the crime, which was committed by two men who covered their heads with stockings. He claimed to have observed one of the men sufficiently to identify him.

On October 5, 1970, Agent L.E. Crisco of the State Bureau of Investigation showed Mr. Clark a single photograph of one Hub Ervin, whom Mr. Clark said strongly resembled the burglar he had observed. (R. 31).

On October 12, 1972, Agent Crisco and Sheriff H.M. Sheldon showed Mr. Clark some fifteen or sixteen photographs (R. 30), of which two were of Petitioner, front and profile views, but which evidently did not include a picture of Hub Ervin, whom Mr. Clark had said strongly resembled

the burglar (R. 26). Mr. Clark identified the pictures of Petitioner as being one of the person who had burglarized his home. Agent Crisco also testified at trial (R. 25), that on another occasion, evidently between October 5 and October 12, he showed Mr. Clark about fifteen photographs "other than this one [of Hub Ervin]."

On October 19, 1970, a fugitive warrant alleging that Petitioner was a fugitive from justice (R. 4), was sworn out in Spartanburg County, South Carolina. Petitioner was arrested on that warrant on October 23, 1970 (R. 4), Having waived extradition, he was transferred to Polk County, North Carolina, on October 24. On October 26, 1970, he was transferred to Henderson County, North Carolina. On October 27, 1970, a North Carolina arrest warrant charging burglary under N.C.G.S. § 14-51 was finally issued. This warrant was served on Petitioner on October 28, 1970. (R. 6).

At the trial, Mr. Clark made an in-court identification of Petitioner as one of the burglars. Petitioner excepted (R. 29-30) and assigned the allowance of the identification as error in the Supreme Court of North Carolina. Petitioner also excepted to and assigned as error the trial court's failure to dismiss the action on the ground of violation of his right to a speedy trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. On the basis of Mr. Clark's identification, Petitioner was convicted of burglary and sentenced to life imprisonment. (R. 51-52)

REASONS FOR GRANTING THE WRIT

1. The procedure of identification was so suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process.

The method by which the photographic identification of Petitioner was obtained clearly fell short of the standards established by this Court. The procedures used made misidentification so likely that the in-court identification should properly have been regarded as tainted. Its admission therefore, constituted a denial of due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

In Stovall v. Denno, 388 U.S. 293 (1967), this Court recognized that a defendant's conviction may be attacked where identification procedures are "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. Id. at 302. More specifically, in Simmons v. United States, 390 U.S. 377, 383 (1968), the Court said that:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently

> follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.

The procedures condemned in Simmons and the dangers inherent in their use, are precisely those which exist in the present case. On October 5, 1970, a day after the crime, the state agent had shown Mr. Clark one photograph of a single individual whom Mr. Clark identified as closely resembling the burglar. On at least two occasions, Mr. Clark was shown a group of photographs. The state agent testified (R. 27), that he was not sure that a photograph of the previously identified man was in the group. Moreover, there were at least two photographs of Petitioner in the group (R. 27), but no indication that other suspects appeared twice.

This emphasis through recurrence substantially increased the danger of misidentification. The danger was further

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APPENDIX

A-1

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	Fall Term, 1972
vs.	No. 10
NORMAN GETTYS HICKS	Polk County.

This cause came on to be argued upon the transcript of the record from the Superior Court, Polk County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Carlisle W. Higgins, Justice, be certified to the said Superior Court, to the intent that PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION.

And it is considered and adjudged further, that the DEFENDANT DO PAY the costs of the appeal in this Court incurred, to wit, the sum of THIRTY-NINE and 00/100 DOLLARS ($39.00), and execution issue therefor.

Certified to Superior Court this 23rd day of October, 1972.

ADRIAN J. NEWTON
Clerk of the Supreme Court.

By: S/MRS. PEGGY N. BYRD,
Deputy Clerk of the
Supreme Court.

IN THE SUPREME COURT OF NORTH CAROLINA
Fall Term 1972

STATE OF NORTH CAROLINA)
-v-) No. 10-From Polk
NORMAN GETTYS HICKS)

Appeal by defendant from Fountain, J. August 23, 1971 Session, Polk Superior Court.

In this criminal prosecution the defendant, Norman Gettys Hicks, was charged in the following bill of indictment:

"INDICTMENT - BURGLARY (Filed 1/25/71)
State of North Carolina 70 CR-930
County of Polk In The General Court of Justice Superior Court Division January Session, 1971

The State of North Carolina
vs.
Norman Gettys Hicks, Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Norman Gettys Hicks, late of the County of Polk, on the 4th day of October, 1970, about the hour of 9:00 P.M., in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one Landon Clark, Hickory Grove, there situate, and then and there actually occupied by one Landon Clark, feloniously and burglariously did break and enter, with intent, the goods and chattels of the said Landon Clark in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away U.S.

Money, television, radio, furniture, and clothing, against the peace and dignity of the State.

M.L. Lowe Solicitor"

Following his arraignment and the plea of not guilty, the defendant filed motions: (1) To continue the case for the term; (2) to quash the warrant of arrest and the grand jury indictment; (3) to dismiss the charges for failure of the State to give the defendant a speedy trial.

The evidence on behalf of the State tended to show that on the night of October 4, 1970, two men broke through the glass door in the home of Mr. Landon Clark, assaulted him by beating him with a shotgun, and forced him to open his safe. Failing to find any money in the safe, they took from the victim's wallet five dollars - all he had. One of the robbers had a thin stocking mask over his face. Mr. Clark was able to identify the defendant as the one wearing the mask. He had observed him under a good light during the time he was in the house. The witness testified that on Friday before the robbery the defendant :...(C)ame to my house and asked to borrow a screw-driver...Then, on Saturday afternoon...the defendant came to my house and rang the doorbell and said he was selling typewriters, sewing machines and portable televisions.

The witness testified he is an architect and trained to observe details. Although the man had a stocking over his head, his features still showed plainly. The witness expecially observed the way the defendant carried his head and moved his hands and arms so that he had no doubt of his identity.

On cross-examination Mr. Clark was asked whether he had seen a photograph or photographs of the defendant in the hands of the officers. He said he had seen two photographs of the defendant among a large display, but that these photographs played no part whatever in his identification of the defendant which was based entirely on observation during the robbery.

The defendant did not testify. However, his mother and father appeared and testified for him. They said the defendant was at their home in South Carolina on October 4. The father testified he was certain of the date, that he signed the defendant's bond to get him out of jail on the evening of October 4 at Spartanburg, South Carolina. In rebuttal, however, the State called Officer Ralph Lamb of the Spartanburg Sheriff's Department who said he knew the defendant, that he was released from jail on bond on October 1.

At the close of the testimony, the court overruled a motion to dismiss.

After the jury returned its verdict finding the defendant guilty of burglary in the first degree coupled with the recommendation the punishment be imprisonment for life, the court imposed the mandatory sentence recommended by the jury. The defendant appealed.

ROBERT MORGAN, Attorney General
By: Thomas B. Wood, Assistant Attorney General For the State

WILLIAM H. MILLER
For Defendant Appellant

HIGGINS, Justice

The defendant's many objections to the trial do not find support in the record before us. The offense was committed on the night of October 4, 1970, in Polk County. A warrant charging burglary in the first degree was executed on October 19, 1970. The defendant was arrested in South Carolina, waived extradition, and was returned to Polk County on October 24, 1970. On January 26, 1971 (the first criminal session after the arrest) Judge Hasty, without objection, entered an order finding the defendant could not be tried in Polk County until the August session of superior court; that he had a record of one escape; and that the Polk County jail was unsafe. Based on these findings, Judge Hasty entered an order transferring the defendant to the State Department of Correction for assignment by the director to a safe prison. The order directed his return to Polk County two weeks prior to the beginning of the August session of the superior court, to the end that his attorney could confer with him and make trial preparations.

However, the prisoner was actually returned twelve days before the beginning of the court, rather than the two weeks fixed in the order. Nevertheless, nothing indicates any lack of time to prepare for the trial or other prejudice resulted from the two days' delay. State v Flowers, 244 N.C. 77, 92 S.E.2d 447. The record does not show error or prejudice in the denial of the motion to continue. Likewise there was no merit in the motion to dismiss for failure of the State to give the defendant a speedy trial. State v Johnson, 275 N.C. 264, 167 S.E. 2d 274. Actually the defendant was indicted at the first criminal session of Polk County Superior Court

January 25, 1971, after the commission of the offense. He was tried at the first session for criminal cases which convened thereafter.

The defendant contends that the State's evidence was insufficient to survive the motion to dismiss. The contention cannot be sustained. Mr. Clark saw the defendant first when he asked to borrow a screwdriver on Friday, and again on Saturday when he called at the Clark home posing as a salesman. These calls apparently were to "case" Mr. Clark's home where antiques worth many thousands of dollars were kept. Mr. Clark testified that he recognized the defendant without question although he had a thin women's stocking over his face. "The stocking did blunt the full facial features but the profile was still the same and particularly under a strong light." Mr. Clark further testified that while he was still in the house "I observed his ears and everything physical about him... and how he carried his head. He does not carry his head straight, he carries it slightly to the left."

On cross-examination by defense counsel, Mr. Clark testified he had seen some photographs of the defendant in the possession of the police department. However, he made it plain that these photographs played no part in his identification of the defendant. The trial court so found. Mr. Clark testified: "...I am an architect and I have been trained to observe details for over 50 years."

The court's finding that the identification was of independent origin and the photographs played no part in the identification of the defendant is supported by competent evidence. The defendant's motion to dismiss was properly denied. State v Gray, 268 N.C. 69, 150 S.E. 21 1.

The broadside objections to the charge cannot be sustained. In fact we find nothing "off color" in the trial.

NO ERROR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

Norman G. Hicks,
Petitioner

v.

State of North Carolina

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CERTIFICATE OF SERVICE

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I hereby certify that on this 9th day of January , 1973 , three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to ROBERT MORGAN, Attorney General, State of North Carolina. I further certify that all parties required to be served have been served.

James Nathaniel Hamrick,
Esquire

William H. Miller

William H. Miller,
Esquire